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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 1031

OCTOBER TERM, 1944.

F. S. LACK,

Petitioner,

vs.

WESTERN LOAN & BUILDING COMPANY, a corporation, and PEARL ASSURANCE COMPANY, LTD., a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, F. S. Lack, respectfully prays that a writ of certiorari issue out of this Court to review the decree and order of the United States Circuit Court of Appeals for the Ninth Circuit, in the cause there pending, No. 10730, being a consolidated cause entitled F. S. Lack, Appellant, vs. Western Loan & Building Company, a corporation, and Pearl Assurance Company, Ltd., a corporation, Appellees, said decree and order dated December 30, 1944, dismissing the appeal of petitioner.

Petition for rehearing below has been denied.

I.

Opinions Below.

The opinion of the main appeal below (the prior appeal) is reported in 134 Fed. Supp. 1017. The opinion of the court below upon the second appeal is not yet reported. Both opinions are printed in the appendix to the brief for the convenience of the Court.

II.

Basis of Jurisdiction.

This is a consolidated cause, one action having been brought in the United States District Court for the Southern District of California, Central Division, by respondent Western Loan & Building Company against petitioner, Lack, and respondent Pearl Assurance Company, Ltd., and the other having been brought by petitioner, Lack, against Western Loan & Building Company, respondent, in the Superior Court of the State of California, in and for the County of Imperial, which action was removed to the District Court on application of respondent Western Loan & Building Company.

The jurisdiction of the District Court in each case was based on diversity of citizenship. The two cases were consolidated and have since been tried and considered as one.

III.

Questions Presented

arose upon the construction of the opinion and mandate upon a prior appeal in which petitioner had been successful in reversing the court below and obtaining a decree of specific performance from the appellate court, and are:

(a) May the Circuit Court of Appeals dismiss (as it did) an appeal where the purpose of the appeal is to obtain the court's construction of its own mandate on the prior appeal?

(b) Where moneys have been paid out of a fund in the registry of the District Court to the appellee under a judgment, and the judgment is reversed and the fund awarded to appellant, must the District Court granting restitution award interest to appellant and if it refuses should the Circuit Court of Appeals review the question on appeal, or (as it did) dismiss the appeal?

(c) Was the Circuit Court of Appeals correct in dismissing an appeal from an order which denied appellant interest, damages for delay, and costs upon the ground that the order was not a final decision?

(d) In a specific performance action is not the award of proven damages resulting from inexcusable delay by the vendor in conveying recoverable as a matter of right?

Petitioner claims that the decisions upon these points, made against him by the Circuit Court of Appeals, is not only wrong but is in conflict with the decisions of this Court and the other Circuit Courts of Appeals; that the question of Federal jurisdiction decided by the Circuit Court of Appeals is important and of general application and that the matter should be settled for the country at large by the Supreme Court of the United States; that the Circuit Court of Appeals has so far departed from accepted procedure in important matters affecting procedure generally throughout the country as to call for the power of supervision by the Supreme Court of the United States.

IV.

Summary of Facts.

Petitioner, as tenant, and Western Loan & Building Company, as landlord, entered into a lease of the Hotel Dunlack at Brawley, California, for a term of six years, commencing January 1, 1935, and ending December 31, 1940 [R.-1 p. 240].* The lease contained an option to tenant to purchase the property at any time during the term of the lease for $35,000.00 and interest, applying all rentals previously paid toward the purchase price [R.-1 p. 249].

Petitioner will hereinafter be referred to as "Lack," the appellee Western Loan & Building Company as "Western," and appellee Pearl Assurance Company, Ltd., as the "insurance company." This petition concerns only the former.

Lack insured the property against loss by earthquake damage. An earthquake occurred on May 18, 1940, causing serious damage to the building, and this litigation was to determine the rights of the parties in certain earthquake insurance, in the property, in the furniture, to damages and costs.

Western brought an action against Lack and the insurance company to recover the proceeds (about $28,000) of the earthquake insurance policy [R.-1 p. 2] which the insurance company later deposited in court, and Lack brought an action against Western [R.-1 p. 27] for specific performance [R.-1 pp. 33-34] of the option contained

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*R.-1 refers to record on first appeal. R. to the record on second appeal [see stipulation R. 44]

Record on first appeal is contained in Records Volumes I and II. Volume III contains motions made after the opinion was rendered and record on second appeal is in Volume IV. The writer did not have the certified record at the time the brief was printed.

in the lease, and for damages for breach of contract, or in lieu thereof, damages.

There was ample proof of heavy damages for delay at the trial [R.-1 pp. 755, 756, 778, 779].

The District Court held that the earthquake terminated the lease and option because paragraph VI thereof [R.-1 p. 245] provided that if a casualty damaged the building so that it could not be repaired within twenty days after possession given to the lessor for that purpose, the lease should terminate and the parties be released, the court having found [R.-1 p. 81] after a lengthy trial that the building could not be repaired within twenty days. It awarded the land, buildings and insurance moneys to Western and the furniture to Lack.

The proceeds of the insurance policies, $28,067.87 (less clerk's fees) were on November 4, 1941, paid to Western [R. p. 13].

Lack then appealed to the Circuit Court of Appeals for the Ninth Circuit from the judgment, except, of course, the portion thereof which awarded him the furniture [R.-1 p. 100].

The Circuit Court of Appeals found that Lack had exercised the option in 1939. He had demanded conveyance at the close of the trial in the District Court. Western received the entire purchase price on November 1, 1941, besides $8000 of Lack's money. Western withheld that money and a deed to the property for years. And Lack is unable to obtain any opinion as to his right to interest, to damages for delay and to costs nearly four years later.

After the trial court had stated its position that it was Lack's duty to make the repairs, *Lack accepted that responsibility* and said, "We will take the $28,000 (the insurance money) and rehabilitate the building" [R.-1 pp. 823, 824]. In appellant's opening brief on the first appeal, appellant stated that that court's finding upon Lack's duty to repair would not be disputed on the appeal (Opening Brief on behalf of appellant in case No. 10158, p. 2).

Upon appeal the Circuit Court of Appeals held that Lack had exercised the option to purchase contained in the lease and granted specific performance to him. The judgment was reversed *in so far as appealed from* [R. p. 3] with costs and the cause remanded with directions to enter judgment awarding Western $19,250 (the balance of the purchase price owing to it) out of the sum of $28,067.87 deposited by the insurance company in the registry of the court, awarded to Lack the balance, and required Western to convey all of the property involved in the litigation.

The mandate contained this further customary provision upon complete reversal (so far as appealed from):

> "You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this court and as accordance to right and justice and the laws of the United States ought to be had." [R. p. 4.]

The opinion was silent upon the question of damages for delay demanded in the complaint [R.-1 pp. 33-34]. On

account of the fact that the record in the first appeal did not disclose that the moneys were withdrawn from the registry of the court where the insurance money had been deposited, no provision was made for restitution or interest.

Before the mandate was transmitted to the District Court, Lack made a motion in the Circuit Court of Appeals (Notice of Motion dated April 28, 1943) requesting the court to modify its opinion so as to indicate to the court below that Lack was entitled to restitution, damages for delay and interest.

This motion was denied without opinion.

A proposed decree was thereupon submitted to Judge J. F. T. O'Connor in the District Court which provided for an assessment of damages for delay, for restitution with interest and trial costs.

The Judge expressed doubt as to whether the court's opinion and mandate had not foreclosed his consideration of Lack's demand for damages and interest [R.-1, affidavit of Henry S. Dottenheim, verified June 15, 1943, in Circuit Court of Appeals, accompanying Notice of Motion of June 18, 1943].

A motion was then made in the Circuit Court of Appeals on June 18, 1943, and returnable June 28, 1943, to recall the mandate and modify the decree so that the court might give its instructions to the court below. This motion was denied without opinion four days before its return date (June 24, 1943).

Thereupon (December 20, 1943) an interlocutory decree of specific performance and restitution was entered on the mandate [R. pp. 12-19] rejecting proposed relief for interest and damages for delay and costs [R. pp. 8 to 10].

A meeting was then held in the Judge's chambers to finally dispose of the question of interest, damages for delay and whether the court would permit any amendment of the pleadings if it thought such amendment was required [R. p. 23]. Thereupon a motion was made to resettle and amend the interlocutory decree [R. p. 19] so as to provide for interest and damages, and

> "2. That in the alternative and under the provision in said interlocutory decree, paragraph 8 thereof, wherein this court has retained jurisdiction under the terms of said decree and granted permission to said Lack to apply for other and further relief as more fully provided in said paragraph, that said F. S. Lack be granted the relief hereinbefore set forth.
>
> 3. That in the event that, contrary to the opinion of the attorneys for said F. S. Lack, the court should be of the opinion that the plaintiff is entitled to damages for breach of contract at this time, but that his pleadings are insufficient to permit such relief, that said F. S. Lack be given leave to amend his complaint in Action 84 S. D. and file an amended and supplemental complaint, setting forth his damages, and
>
> 4. That plaintiff have such other and further relief as in the premises may be just and proper."

This motion was denied by minute order of February 16, 1944, a motion of Western to strike was granted and exception allowed [R. p. 32].

The appeal was taken to the Circuit Court of Appeals from the interlocutory decree failing to allow interest [R. p. 33] and damages [R. p. 34] and from the order entered February 16, 1944, and from each and every part of that order and from the whole thereof [R. p. 35].

This appeal was dismissed by the Circuit Court of Appeals upon two grounds: First, that while Judge O'Connor had entitled the decree as "interlocutory decree pursuant to mandate of the Circuit Court of Appeals" [R. p. 12], that Judge O'Connor was in reality not carrying out the mandate at all because the Circuit Court of Appeals had intended to direct a final judgment and that the judgment being interlocutory in form, was not appealable; and second, that the order of February 16, 1944, was not a final decision, hence not appealable.

Petitioner submits:

1. That it was the duty of the Circuit Court of Appeals to construe its own mandate, and not to dismiss the appeal.

2. That the order of February 16, 1944, was a final decision in that it denied petitioner interest, damages and costs, and regardless of the outcome of the appeal on the merits, the Circuit Court of Appeals should have taken jurisdiction and considered the appeal.

3. That in furtherance of justice this Court consider the appeal on the merits.

V.

Reasons for Granting the Petition.

1. That the court below erred in dismissing the appeal, because it had inherent power over its mandate and to see that the court below carried it out precisely as was intended by the appellate court.

2. That the order of February 16, 1944, was a final decision.

3. That the undisputed facts in the record will show that the petitioner is entitled to interest on the amount awarded to him in restitution and to damages for delay.

The foregoing are well settled as the law by this Court and the various Circuit Courts of Appeals. That the Circuit Court of Appeals had full power and should have taken jurisdiction of the appeal. see

United States v. Morgan, 307 U. S. 183,

where the court said:

> "It is a power inherent in every court of justice so long as it retains control of the subject matter of the parties, to correct that which has been wrongfully done by virtue of its process, * * *"

and

> *Morris v. S. & E. Com.* (C. C. A., 2d Cir.), 116 Fed. (2d) 892, 898,

where the court said:

> "If the tribunal to which a cause is remanded misconstrues or fails to follow the mandate of the appellate court, the mandate may be enforced by a new

appeal. * * * *Re* Sandford Fork & Tool Co., 160 U. S. 247, 256; Pottsville B. C. v. F. C. C., 105 Fed. (2d) 36, 39; Home Ins. Co. of N. Y. v. O'Brien, 112 Fed. (2d) 387, 388."

That the order of February 16, 1944, was a final order is fully established in *Ex parte v. Tiffany*, 252 U. S. 32, where the court, holding that an order refusing to turn over to a state court chancery receiver certain property in *custodia legis* was a final decision, and granting a writ of certiorari and reversing the Circuit Court of Appeals which had dismissed the appeal, says:

> "By the order, the right of the state receiver to possess and administer the property of the corporation was finally denied." (P. 36.)

By the minute order of February 16, 1944, petitioner's right to costs, interest, and damages was finally denied.

To deny this writ would cause meaningless expense and delay.

It would mean going through the useless procedure of entering a final judgment which would simply be a repetition of the order of February 16, 1944.

Courts should not require parties to litigation to perform vain and useless acts on solely technical considerations.

Therefore, your petitioner submits that the judgment of the Circuit Court of Appeals is erroneous and that this Honorable Court should require this cause to be certified to it for review and determination.

Your petitioner presents herewith as a part of this petition a brief showing more fully the views of his counsel upon the questions involved, and a certified transcript of the record of the Circuit Court of Appeals.

Wherefore, your petitioner respectfully prays and petitions that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding such court to certify and send to this Court on a certain day to be therein designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals in the case therein entitled, "F. S. Lack, Appellant, vs. Western Loan & Building Company, a corporation, and Pearl Assurance Company, Ltd., a corporation, Appellees," being No. 10730 in said court; and to cease and withdraw any further action or order of said court until the further order of this Court, to the end that the case may be reviewed and determined by this Court and that this Honorable Court will proceed to correct the errors complained of and reverse said judgment, and remand such cause, and give to your petitioner such other and further relief as the nature of this case may require, and to this Court seem proper and just in the premises.

Los Angeles, Feb. 28, 1945.

F. S. LACK,
Appellant and Petitioner.

State of California, County of Los Angeles—ss.

F. S. Lack, being first duly sworn, deposes and says: That he is the petitioner herein; that he has prepared the foregoing petition and that the allegations therein are true as he verily believes; and that in his opinion the same is well founded and the prayer of the petitioner should be granted by this Honorable Court.

F. S. LACK.

Subscribed and sworn to before me this 2nd day of March, 1945.

(Seal) MARGUERITE F. CRIPPS,
Notary Public in and for Said County and State.
My commission expires January 3, 1948.

Certificate of Counsel.

I hereby certify that I have carefully examined the foregoing petition for writ of certiorari and the allegations thereof are true as I verify believe, and in my opinion the same is well founded and the case is one in which the prayer of the petitioner should be granted by this Honorable Court.

JOHN L. SCHAEFER,
HENRY S. DOTTENHEIM,
By HENRY S. DOTTENHEIM,
Of Counsel.